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ABSTRACT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 203.

JAMES HENNESSY, MAURICE HENNESSY, ARMAND CASTELLON, AND EMANUEL CASTAIGNE, APPELLANTS,

vs.

RICHARDSON DRUG COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

RECORD FILED DECEMBER 8, 1904.

(18,941.)

(18,341.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 15, 1902.

1 In the Supreme Court of the United States, October Term, 1901.

JAMES RICHARD MAURICE HENNESSY, JAMES FRANCIS Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, Emmanuel Castaigne, Appellants,
against
RICHARDSON DRUG COMPANY, Appellee.
} No. —.

Come now the appellants, James Richard Maurice Hennessy, James Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne by Adolph L. Pincoffs, their counsel, and say that in the record and proceedings filed herein there is manifest error in this, to wit:

1. The United States circuit court for the district of Nebraska erred in dismissing appellants' bill for want of jurisdiction.

2. Said United States circuit court erred in making its order and decree that the jurisdictional allegations in the amended bill were not sufficient.

3. Said United States circuit court erred in holding that it was incumbent on appellants to plead and prove that appellants were "subjects" of the Republic of France.

4. Said United States circuit court erred in holding that the evidence did not show the diverse citizenship of appellants and appellee.

5. Said United States circuit court erred in holding that it was incumbent on appellants to prove the diversity of the citizenship of appellants and appellee.

6. Said United States circuit court erred in attempting to
2 pass upon the merits of the suit after dismissing the suit for want of jurisdiction.

The said appellants, therefore, pray that the decree of dismissal may be reversed, annulled and held for nothing, and that they may be restored to all things which they have lost by occasion of the said decree.

A. L. PINCOFFS,
Counsel for Appellants.

3 In the Supreme Court of the United States.

JAMES RICHARD MAURICE HENNESSY, JAMES FRANCIS HENRY Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne, Appellants,
vs.
RICHARDSON DRUG COMPANY, Appellee.

Statement of parts of the record which appellants deem necessary for the consideration of the errors on which they intend to rely.

1. Amended bill.

2. Answer.

3. Replication.
4. Depositions of plaintiffs taken in Cognac, France.
5. Certificate of Commissioner of Patents as to the registration of plaintiffs' trade-mark.
6. Opinion of the court.
7. Order of dismissal.
8. Assignment of error and petition for appeal.
9. *Nunc pro tunc* decree dismissing complaint.
10. Order allowing appeal.
11. Certificate of appeal.

A. L. PINCOFFS,
Counsel for Appellants.

4 In the Supreme Court of the United States.

JAMES RICHARD MAURICE HENNESSY, JAMES Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne, Appellants,
vs.
RICHARDSON DRUG COMPANY, Appellee.
} 77 T. Certificate.

Received this 28th day of February, 1902 from Richard S. Horton, solicitor for appellants, a carbon copy of the statement of errors and the abstract of the record filed in said Supreme Court.

CHAS. F. TUTTLE,
Solicitor for Appellee.

5 In the Supreme Court of the United States.

JAMES RICHARD MAURICE HENNESSY, JAMES FRANCIS Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, Emmanuel Castaigne, Appellants,
against
RICHARDSON DRUG COMPANY, Appellee.
} No. —.

Appeal from the circuit court of the United States for the district of Nebraska.

Pleas before the Hon. William H. Munger, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States, within the eighth judicial district, at the May, 1901, term thereof.

Be it remembered, that on the 11th day of April, 1898 the amended bill of complaint was filed in the clerk's office of said circuit court, which said bill is in words and figures following, to wit:

6 In the Circuit Court of the United States for the Judicial District of the State of Nebraska.

JACQUES RICHARD MAURICE HENNESSY, JACQUES Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne

against

RICHARDSON DRUG COMPANY, a Corporation.

} In Equity.

To the honorable judges of the circuit court of the United States for the judicial district of Nebraska:

First. Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, all of Cognac in France, and citizens of the Republic of France, bring this, their bill of complaint against Richardson Drug Company of the city of Omaha, county of Douglas, State of Nebraska, a resident of the judicial district aforesaid, and a citizen thereof, and thereupon your orators complain and say:

Second. Complainants state that at all times hereinafter mentioned they were copartners under the firm name and style of James Hennessy and Company. That the complainants are and for a long time previous to the commission of the grievances hereinafter mentioned, have been exporters, bottlers and vendors of a cordial or liquor known as Hennessy brandy, which the complainants and their predecessors in the partnership business have for upwards of thirty years last past produced, bottled and sold.

Third. That said brandy when bottled by these complainants is put up in peculiar tall dark-colored bottles, to wit: twelve inches in height, bearing (*a*) a rectangular label bearing the inscription "Jas. Hennessy & Co. cognac" in gold letters on a white ground,
7 encircled by a wreath of vine leaves and grapes, in gold, said wreath being surmounted by an arm bearing a battle-axe, also in gold; (*b*) a small oblong label of white with gold border lines, bearing the word "France" in gold; (*c*) a crescent-shaped label; (*d*) a cork branded with the words "Jas. Hennessy & Co.;" (*e*) a metal capsule; all with their own proper devices and trade-marks adopted by the complainants for that purpose the year A. D. 1870, and all encased in square wooden boxes holding twelve bottles each.

Fourth. That by reason of the long experience and great care of the complainants in their said business, and the good quality of said brandy, distinguished as it was by its trade-marks, trade-names, labels, corks, capsules, and the shape, size and color of its bottles, the same has become widely known in the community and throughout the world as a useful and valuable cordial and acquired a high reputation as such, and has commanded, and still commands an extensive sale throughout the United States and Europe, which is and has been a source of profit to these complainants. That the value of said trade-mark exceeds the sum of $2,000.00.

That said brandy when bottled by complainants is known as such brandy to the public, buyers and consumers thereof by the said name of James Hennessy and Company's brandy, or Hennessy brandy, or Hennessy cognac, together with the complainants' own proper devices, trade-names and trade-marks aforesaid, and by its straw wrappers or casings accompanying and enclosing said bottles, and by the peculiar shape and color of the bottles themselves. That the trade-mark of complainants is and has been during all the acts herein complained of, properly registered in the United States Patent Office in the city of Washington, District of Columbia, under the act of Congress approved March 3, 1881.

8 Fifth. Complainants state that notwithstanding the long and quiet use and enjoyment by the complainants of said trade-name and trade-mark and to the form, device and descriptive matter of said labels, the defendant, well knowing the premises and with the preconceived intention to injure the complainants, and with the purpose to defraud them and with the purpose to deprive these complainants of the benefits and profits resulting from the great reputation acquired for said brandy, and the consequent demand therefor, and with the intent to acquire for itself the benefits and profits of said reputation, and with the intent to palm off on on the public brandy not being exported, sold or bottled by complainants, as the goods of the complainants, and in wilful disregard of complainants' rights in the premises, kept, offered for sale and sold, and advertised for sale, and now keeps, offers for sale and sells in Omaha, county of Douglas, and State of Nebraska, and elsewhere in the United States of America, a concoction or compound in imitation of complainants' brandy under the name of "Hennessy brandy," using fac-similes of complainants' trade-name, devices and labels which, with intent to deceive and defraud the public and the buyers and consumers thereof, it has caused to be put up in cases like complainants'; and in bottles precisely like those used by these complainants as aforesaid.

Sixth. That such imitation is calculated to deceive the purchasers and consumers of said brandy, and is calculated to cause the public and the buyers and consumers thereof to believe that the brandy kept and offered for sale and sold by defendant is the brandy exported bottled and sold by the complainants.

Seventh. That such imitation is calculated to deceive and mislead the purchasers and consumers of the complainants' brandy, and has actually deceived and misled and still does mislead many

9 of them to buy the brandy or liquor sold by the defendant in the belief that it is the brandy exported and bottled by the complainants, to the great loss, injury and damage of the complainants.

That the article so put up and sold by the defendant is of greatly inferior quality to that of the complainants, and deleterious to the health of the consumer, and the general esteem and reputation of the brandy exported by the complainants, has been and is now being injured and damaged thereby.

Eighth. Forasmuch as your orators can have no adequate relief,

except in this court, and to the end therefor- that the defendant may, if it can show why your orators should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived.

And that the defendant may be decreed to account for and pay over the income or profits thus unlawfully derived from the violation of your orators' rights, your orators pray that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court perpetually enjoining and restraining the said defendant, its clerks, attorneys, agents and servants from keeping, offering for sale, or selling brandy not being the brandy exported and bottled by your orators, put up in bottles of the general form, shape and color of complainants' bottles, and wrapped with labels of the form, device, and in the manner complained of, or in any other form and device, which shall be a colorable imitation of complainants' brandy or from applying to any such brandy the name "Hennessy brandy," or from using upon or in connection with said brandy the name "Hennessy," or any combination of such name or name of like sound, and that the defendant deliver up to your orators all bottles having thereon said false labels, and also all such false labels in its possession or under its control to the end and purpose that the same may be destroyed.

And that your honors upon the rendering of the decree above prayed may assess, or cause to be assessed, in addition to the profits to be accounted for by the defendant as aforesaid, the damages your orators have sustained by reason of the premises.

May it please your honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said Richardson Drug Company commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

(Signed) ADOLPH PINCOFFS,
JAMES L. HOPKINS,
RICHARD S. HORTON,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
The Judicial District of Nebraska, } *ss.:*

Richard S. Horton on behalf of said complainants, Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, and duly authorized to act for them herein, being on his oath sworn, deposeth and says that he has read the above bill of

complaint, and that the matters therein set forth are true to his best knowledge, information and belief.

RICHARD S. HORTON.

Subscribed and sworn to before me, this 11th day of April, 1898.

BRYCE CRAWFORD,

[NOTARIAL SEAL.] *Notary Public.*

11 And upon the 7th day of February, 1898 an answer was filed in the clerk's office of said circuit court, which said answer is in words and figures following, to wit:

12 In the Circuit Court of the United States for the Judicial District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, Armand Castillon, Emmanuel Castaigne, Copartners as James Hennessy & Co.,
vs.
THE RICHARDSON DRUG CO., a Corporation.
} In Equity. 77 T.

The Answer of the Above-named Defendant to the Bill of Complaint of the Above-named Plaintiffs.

In answer to said bill, the above-named defendant says:

1. As to whether or not, there is located at Cognac, France, or elsewhere, a copartnership by the name of "James Hennessy & Co." this defendant has not sufficient knowledge or information to expressly admit or positively deny that allegation of the plaintiffs' bill, but upon the best information, now obtainable, to this defendant, it denies that there is such a copartnership as "James Hennessy & Co." located at Cognac, France, or elsewhere, and denies that there is such a man as James Hennessy connected with such a copartnership, if any such copartnership there be. As to whether or not the complainants, under the firm name of "James Hennessy & Co." ever produced, bottled and sold any cordial or liquor known as "Hennessy brandy," this defendant has not sufficient and definite information or knowledge to enable it to admit or deny that allegation of the bill, but from the best information now in its possession, this defendant alleges that said copartnership, if any such there be, never produced, bottled or sold any cordial or liquor known as "Hennessy brandy."

2. This defendant admits, however, that there is sold in the markets of the United States a cordial or liquor, labeled and known as "Jas. Hennessy & Co., cognac,—France," and that these complainants claim to be the proprietors, producers, and venders of said liquor and that said liquor is put up in bottles substantially

13 of the character described in the third paragraph of the complainants' bill, and are labeled substantially as described in said paragraph of the complainants' bill, but this defendant alleges that the liquor contained in such bottles, thus labeled, is not "cognac."

3. That cognac is a French brandy of superior quality, distilled from wines produced in the neighborhood of "Cognac," a town of France in the province or department of Charante, famous for the production and distillation of said liquor and that said liquor is obtained and distilled from wines produced from grapes grown in the neighborhood of Cognac and throughout the province of Charante, France, and that the general purchasing public understand the word "cognac" applied to liquors to imply and mean a brandy distilled at Cognac, obtained from grape wine, produced from grapes grown in the neighborhood of that city; that "cognac" produced and distilled at Cognac, France, from the wines produced from grapes grown in that part of France is a superior quality of liquor or brandy and is so known and regarded by the general purchasing public, throughout the United States, but this defendant alleges that the liquor or brandy, bottled and labeled as aforesaid and which these complainants claim to produce and vend in the market of the United States, is not and never has been obtained from wines produced in the neighborhood of Cognac or in the province of Charante, or even in France, but on the contrary alleges the fact to be that the said liquor brandy thus claimed to be produced and sold in the markets of the United States by these complainants under the above-described label, is distilled, produced, bottled and labeled in the United States; that the liquor sold in the bottles above described and under the above-described label and which complainants claim to produce, distill, bottle and label at the town of Cognac, France, is not an imported liquor at all, but in order to
14 deceive and defraud the purchasing public, these complainants label and advertise said liquor by their so-called trade-mark as "cognac," implying and meaning that it is "cognac brandy," or liquor produced as aforesaid and in the aforesaid manner, at the town of Cognac, in France; that the liquor actually bottled and sold by these complainants is, as compared with cognac, a vile and deleterious concoction, and that the alleged trade-mark, or label, is a fraud, used by complainants to deceive the purchasing public.

4. Referring to the "peculiar, tall, dark-colored bottles" mentioned in the third paragraph of the complaint, the defendant admits that said bottles are peculiar, but that the most peculiar feature about them is that they are so deceptively cast that they contain neither a quart nor a pint of liquor, although the large size of such bottles placed upon the market are advertised by complainants to contain a quart of liquor, and are so constructed that from their height and general appearance they are made to appear of the size of a quart bottle and made to look as though they would contain a quart of liquor, but when inverted or critically examined it will be discovered that the bottom of the same is so deceptively constructed and cast that the said bottles contain considerably less than a quart, and that this is equally true of the pint bottles, of "a peculiar dark color" used by the complainants, and that not only in the labels used but also in the bottles containing the liquid sold, the complainants have been and are now engaged in swindling and defrauding the public, and that whatever, if any, property right, or value, the

complainants may have acquired in the use of their alleged trade-mark, or name, or in the use of their "peculiar, tall, dark-colored bottles" they have acquired the same through the instrumentality of a long course of falsehood and misstatements.

15 5. That as to whether or not the complainants have ever offered for sale or sold, or are now offering for sale, or selling any of their alleged "cognac" within the State of Nebraska, this defendant has not sufficient information or knowledge whereon to form a belief but it alleges that if complainants are now making, or have ever made sales of their alleged "cognac" within the State of Nebraska they have sold the same and are offering the same for sale in violation of not only the laws of the Commonwealth of Nebraska, but in violation also of the revenue laws of the United States, in that the complainants have not, and never have had any license under the State law of Nebraska to sell or offer for sale their alleged "cognac" at any point within said State, nor have they now, nor have they ever had any license from the United States Government to offer their alleged "cognac" for sale or to sell the same within the State of Nebraska, or elsewhere within the United States.

6. This defendant admits that it is a corporation organized and existing under the laws of the State of Nebraska, and is engaged in business in the city of Omaha within said State.

7. And still further answering the bill of complaint, this defendant denies each and every paragraph and allegation thereof, except such allegations thereof as are hereinbefore admitted to be true.

JOHN P. BREEN,
CHAS. F. TUTTLE,
Solicitors for Defendant.

Waiving any and all right to the benefit of the order heretofore entered in this case, taking the bill of complain*ants pro confesso*, the complainants by their solicitors hereby consent to the filing of this answer on or before the February rule day, 1898, of said court and consent that the same may be treated as the answer of the defendants as though no default had been made or entered of record against them upon "appearance day."

JAMES HENNESSY ET AL.,
By RICHARD S. HORTON,
Solicitor for Complainants.

16 And thereupon afterward, to wit: on the 2nd day of May, 1898 a replication was filed in the clerk's office of said circuit court, which replication is in words and figures following, to wit:

17 In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

JACQUES RICHARD MAURICE HENNESSY, JACQUES FRANCIS Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne
against
RICHARDSON DRUG COMPANY, a Corporation. } No. —.

The replication of Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne, complainants, to the answer of the Richardson Drug Company.

These repliants saving and reserving unto themselves now and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things these repliants are, and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray as in and by their said bill of complaint they have already prayed.

RICHARD S. HORTON,
Solicitor for Complainants.

18 Thereupon afterwards, to wit: on the 9th day of August, 1898, the depositions by Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne were filed in said case, which said depositions are in words and figures following, to wit:

19 *Commission.*

UNITED STATES OF AMERICA,
District of Nebraska.

In the Circuit Court of the United States for the District of Nebraska.

The President of the United States of America to Geo. Jackson, consul of the United States of America at Cognac, of the Republic of France, Greeting:

Know ye, that in confidence of your prudence and fidelity you have been appointed and by these presents you are invested with full power and authority to examine

Jacques Richard Maurice Hennessy,
Jacques Francis Henry Hennessy,
James Richard Charles Hennessy,
Armand Castillon and
Emmanuel Castaigne,

on their corporal oath, as witnesses in a cause depending in the circuit court of the United States for the district of Nebraska, wherein Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, are plaintiffs, and Richardson Drug Company is defendant, on the part of the plaintiffs upon the interrogatories annexed to this commission, and therefore you are hereby authorized and required to cause them to come before you at such time and place as you may therefor designate and appoint, and carefully to take their teestimony upon all the said interrogatories attached to these presents, and none others, under the oath or affirmation of said witnesses by you in that behalf duly administered, and the same, when thus taken and signed and certified by you, together with this commission, and the papers hereto annexed, you will return to the clerk of our said court, at Omaha, Nebraska, United States of America, with all convenient speed.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 29th day of August, A. D. 1899. Issued at my office in the city of Omaha, under the seal of said circuit court, the day and year last aforesaid.

OSCAR B. HILLIS, *Clerk.*

RICHARD S. HORTON,
Att'y for Pl't'ff.

20 Interrogatories to be propounded to Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne.

Int. 1. State your name, age, residence and occupation.

Int. 2. State the history of the firm James Hennessy & Co. and the trade-names, trade-marks and brands if there are any, used by that firm?

Int. 3. State the various kinds of bottled cognac exported by the firm of James Hennessy & Co. to the United States of America, and the source of such cognac, the manner in which it is bought, grown, selected, blended, or otherwise treated by James Hennessy & Co. before it is bottled?

Int. 4. What personal knowledge have you of the source, age, character and quality of the cognac so bottled by James Hennessy & Co. If your knowledge is such as to advise you of the facts, describe fully the source, age, character and quality of such bottled cognac?

Int. 5. Where are the various bottled cognacs of James Hennessy & Co. referred to hereinbefore, bottled; and if at Cognac, in France, state how long they have been bottled at said Cognac, in France, and

whether they have ever been bottled in any other city or locality in the world?

Int. 6. What knowledge have you of the plant of Jas. Hennessy & Co.? If you have knowledge enabling you so to do, describe that plant and its location fully, attaching to your testimony such ground plans designs, maps, prints, engravings as may better explain the character situation, purpose, capacity, nature, departments, and particularly the bottling machinery, if any, in said plant contained.

Int. 7. Where and by whom are the capsules used by Jas. Hennessy & Co. in bottling their brandies made? If they have ever been made by any other person at any other place you will so state in your answer.

21 Int. 8. Where and by whom are the labels used by Jas. Hennessy & Co. in bottling their brandies made? If they have ever been made by any other person at any other place you will so state in your answer.

Int. 9. Where and by whom are the wood cases used by Jas. Hennessy & Co. in bottling their brandies made? If they have ever been made by any other person in any other place you will so state in your answer.

Int. 10. Where and by whom are the corks used by James Hennessy & Co. in bottling their brandies branded? If they have ever been branded by any other person at any other place you will so state in your answer.

Int. 11. State the provisions of the law of the Republic of France relating to adulteration of drink products, if any, setting forth the exact language of the act and the date of its enactment.

Int. 12. State what inspection, if any, your product is subject to under said act, or otherwise, for the determination of its purity, and state any other facts which in your judgment tend to show whether the bottled cognac of Jas. Hennessy & Co. exported to the United States are pure or adulterated.

Int. 13. Name some chemists or other experts, official or unofficial, who have analyzed said bottled cognac, giving the present residence of such chemists or other experts, and the name of the consul of the United States before whom their testimony in this behalf may be taken?

Int. 14. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them or that may be material to the subject of this examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

22 JAS. HENNESSY & Co.
vs.
RICHARDSON DRUG COMPANY.

1. Jacques Richard Maurice Hennessy, 64 years, Cognac, brandy merchant.

Jacques Francis Henry Hennessy,	57	"	"	"
James Richard Charles Hennessy,	31	"	"	"
Armand Castillon,	52	"	"	"
Emmanuel Castaigne,	52	"	"	"

2. Richard Hennessy, Esq. of New York came over to France in 1765 to establish a house, as a brandy merchant, at Cognac under the name of Hennessy, Connelly & Co. In 1771 the above firm underwent a change, and the same business was carried on by Hennessy & Saule until the latter's death in 1778. Between this time and Jan. 1, 1813 the business was conducted under the name Richard Hennessy & Son & Hennessy & Turner. From the last-mentioned date until the present moment the firm has been known as Jas. Hennessy & Co. The marks and brands of firm Jas. Hennessy & Co. are as follows:

On casks the words: Jas. Hennessy—Cognac.

On cases the words Jas. Hennessy—Cognac and the trade-mark which is a mailed arm grasping a battle-axe.

On large bottle labels the words: Jas. Hennessy & Co. Cognac surrounded by a wreath of grape vines, with the arm and battle-axe above the words.

On neck labels, various marks to distinguish the age of the brandy in each bottle, these labels are as follows: (See page 2.)

3. There is but one kind of brandy, as far as quality is concerned made by this house but the prices differ according to the age of the liquor. The source of our cognac is from the distillation of grape wine, said wine being produced in the departments known as "Les Charentes." We buy the brandy from local growers who have themselves distilled it or the wine made from grapes grown
23 in the Charente vineyards and distill it ourselves. These vineyards are owned mostly by local growers, although members of the firm Jas. Hennessy & Co. supply some wine from their vineyards. The distilled liquors and wines are carefully selected by members of the firm personally from samples submitted to them. We blend brandy by mixing several growths of the same year's product so as to obtain a uniform standard.

Our treatment consists in maturing our cognac in wood simply.

Price-list.

Brand.

(Mailed arm grasping battle-axe.)

Jas. Hennessy.

Cognac.

These marks, except 1 star are found on neck labels.	"Fine pale"	1 star
	" "	2 star
	" "	3 star
	" "	V O
	" "	S O
	" "	X O
	" "	X S O
	" "	X X O
	" "	Oldest and finest.

On corks is branded the name Jas. Hennessy & Co. and also the sign or distinctive mark found on the neck label, the whole enclosed in an oblong square.

On capsules is found the trade-mark *i. e.* arm and battle-axe, and the words Jas. Hennessy & Co. Cognac. The words are arranged around a circle in the center of which is the trade-mark.

4. Each member of the firm knows personally of the source, age, character and quality of brandy bottled by us.

24 The source of our cognac is already described in the foregoing question (No. 3).

The age of our cognac is from one year to 60 years.

The character of our brandy is pure, a fact for which the name Jas. Hennessy stands.

The quality is the best that the cognac district affords.

5. Our brandies have always been bottled at Cognac, France, and never by this firm in any other city or locality in the world. This firm has never given permission to any other agents or other persons to bottle our cognac in any other city or locality nor to permit the use of bottles bearing our labels for such a purpose. Our brandy has always been bottled in Cognac.

6. Each member of the firm Jas. Hennessy & Co. has an accurate knowledge of every building and every part of every building connected with our establishment.

We have general stores located on the east bank of the River Charente about 100 yards south of the Avenue Denfert-Rocherean in the city of Cognac, department La Charente, France where are our offices, bottling plant, cooperage, blending vats, some storehouses, etc. These cover an area of over six acres. In different parts of the town and in the suburbs we have many storehouses which cover an additional 18 acres. The capacity of all our storehouses is 50,000 half pipes. The capacity of our blending vats 60 half pipes each. We supply to the trade 300,000 to 350,000 cases of cognac annually, and about 7000 half pipes. Our bottling plant consists of machinery to fill bottles, compress and insert corks, and to fix the capsules. We have sufficient machines to meet whatever demand our trade may make upon us.

7. The capsules used by Jas. Hennessy & Co. are made by
25 Betts & Cie., 3 Quai Chartrons, Bordeaux. This firm has made all our capsules for the past 35 years continuously.

8. All the labels used by us have been made by two houses between whom our orders for said labels have been divided. They are E. Pichot, 54 Rue de Clichy, Paris and V. Palyart, 67 Faubourg, St. Denis, Paris. No others have made our labels.

9. All our wood cases have been made in Cognac and nowhere else. They have been supplied us by Lucien Marchand and many small dealers.

10. All corks used by us in bottling cognac are made and branded in Cognac by M. Gelle under our supervision. They have been neither made nor branded by any other person or elsewhere.

12. Our establishment has not been visited by any government officials to inspect our products. There has been an analysis of our

cognac by the municipal chemists at Paris the result of which was satisfactory; we have never experienced any difficulty with the authorities of France or any other country on account of the quality of our brandy. We have always shipped to the U. S. the one quality we make, pure cognac brandy, with the characteristic flavor known as Hennessy's, which is produced by blending the various products of the same year from different vineyards so as to always obtain the characteristic standard.

11. *Extrait du Code Penal.*

Article 423. (L. du 13 Mai 1863.) Quiconque aura trompé l'acheteur sur le titre de la matière d'or ou d'argent, sur la qualité d'une pierre fausse vendue pour fine, sur la nature de toute marchandise, quiconque, par usage de faux poids, ou de fausses mesures aure trompe sur la qualité des choses vendues, sera puni d'un emprisonnement pendant trois mois au moins, un an au plus, &
26 d'une amende qui ne pourra excéder le quart des restitutions & dommages interêts, ni etre au dessous de 50 francs.

Les objets du délit, ou leur valeur, s'ils appartiennent encore au vendeur, seront confisqués; les faux poids & les fausses mesures serent aussi confisquées, & de plus brisée.

Le tribunal pourra ordonner l'affiche du jugement dans les lieux qu'il désignera, & son insertion intégrale ou par extrait dans tous les journaux qu'il désignera, le tout aux frais du condamné.

Loi.

Tendant a la Repression Plus Efficace de Certaines Fraudes dans la Vente des Marchandises.

(27 Mars 1851.)

Article 1er. Seront punis des peines portées par l'art. 423 du Code Penal:—1. Ceux qui falsifieront des susstances au denrees alimentaires ou medicamenteuses destinées a etre vendues:—2. Ceux qui vendront cu mettront en vente des substances cu denrees alimentaires cu medicamenteuses qu'ils sauront etre falsifiées ou corrompues:—3. Ceux qui auront trompé ou tenté de tromper, sur la qualité des choses livrées, les personnes aux quelles ils vendent ou achètent, soit par l'usage de faux poids ou de fausses mesures, ou d'instruments inexacts servant au pesage ou mesurage, soit par des manœuvres ou procedés tendant a fausser l'operation du pasage ou de mesurage ou à augmenter frauduleusement le poids ou le volume de la marchandise, même avant cette operation; soit, enfin, par des indications frauduleuses tendant a faire croire a un pesage ou mesurage antérieur & exact.

Loi.

Qui Declare Applicables aux Boissons les Dispositions de la Loi du 27 Mars 1851.

27 (5 Mai 1856.)

Art. 1er. Les dispositions de la loi du 27 Mars 1851 sont applicables aux boissons. (Modifie; L. du 24 Juillet 1894) (I)

Art. 2. L'article 318 & le No. 6 de l'art. 475 du Code Penal sont & demeurent abrogés.

(I.) Cette loi du 24 Juillet 1894 ne traite que de l'alcoolisation & du mouillage des vins, elle n'a rien innove en ce qui concerne les autres boissons.

13. The following chemical analysis has the signature of the chemist certified by the U. S. consul general at London.

From the analysis of three samples of brandy received in October last from Messrs. Twiss & Brownings bearing the marks Jas. Hennessy & Co. Cognac & distinguished by the brands (here are given one star, two stars, three stars) on the corks, results were obtained showing that, in each instance, the brandy was of superior quality. The analytical data established that point conclusively; but, as is usual in such cases, as will be seen by comparing those data, they did not fully indicate the relative quality of the several samples which is wholly due to age and is acquired by keeping good brandy either in cask or bottle. Those differences elude chemical analysis, and are recognizable only by the gustatory sense. But in regard to the quality of the brandy bearing any one of the marks above mentioned, I have no hesitation in expressing my opinion that it is the genuine concentrated product of the grape resulting from fermentation and distillation.

(Sign.) DR. B. H. PAUL.

28

	1 star.	2 star.	3 star
Specific gravity	9374	9383	9383
Alcohol	39.7	39.7	39.7
Acidity	.036	.036	.046
Extractive	.65	.71	.71
Ethers	.048	.053	.052

14. The preceding answers fully set forth the facts connected with our business. If anything is omitted it is not consciously or willingly done.

We, the undersigned, Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, do solemnly swear that the foregoing facts are true answers to the interrogatories made to us by George H. Jackson, U. S. consul, at La Rochelle, but formerly at Cognac, France.

MAURICE HENNESSY.
JACQUES FRANCIS HENRY HENNESSY.
JAMES HENNESSY.
ARMAND CASTILLON.
E. CASTAIGNE.

Sworn to and subscribed before me.

GEORGE H. JACKSON,
U. S. Consul. [SEAL.]

La Rochelle, France.

29 Thereupon afterward, to wit: on the 26th day of April, 1899 the certificate of the Commissioner of Patents, marked "Exhibit A, John W. Battin, examiner in chancery" was filed in said case, which Exhibit A is in words and figures following, to wit:

30 DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the trade-mark registered by Jas. Hennessy & Co. October 25, 1881, number 8,770 for brandy.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the city of Washington this 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

(Signed) A. P. GREELEY,
[SEAL.] *Acting Commissioner of Patents.*

31 No. 8770.

The United States of America to all to whom these presents shall come:

This is to certify that by the records of the United States Patent Office it appears that Jas. Hennessy & Co. of Cognac, France, did on the 28th day of September, 1881, deposit in said office for registration fac-similes of a certain trade-mark for brandy and the date of the receipt thereof was duly noted and recorded; that on the 28th day of September, 1881, they deposited therewith a statement and a written declaration under the oath of Jas. Hennessy, a member of *of* said firm, copies of all of which are hereto annexed; and the said firm having made the payment of a fee of twenty-five dollars, and complied with the regulations in such cases prescribed by the Commissioner of Patents and in all other respects complied with an act of Congress approved March 3, 1881, entitled "An act to authorize the registration of trade-marks and protect the same," the said fac-similes, statement, and declaration were duly recorded, and the said trade-mark has been duly registered in the said Patent Office this 25th day of October, one thousand eight hundred and eighty-one, and protection therefor will remain in force for thirty years from said date unless sooner terminated in accordance with section 5 of said act.

In testimony whereof the seal of the Department of the Interior is

hereto affixed this 25th day of October, 1881, and of the Independence of the United States the one hundred and sixth.

Given under my hand at Washington, D. C.

E. M. MARBLE,
Commissioner of Patents.

[L. S.]

32 Thereupon afterwards, to wit, the 28th day of June, 1901 a memorandum opinion was filed in said case, which said memorandum opinion is in words and figures following, to wit:

33 In the Circuit Court of the United States, District of Nebraska.

JAMES HENNESSY ET AL.
vs.
RICHARDSON DRUG COMPANY. } No. 77 T.

JAMES HENNESSY ET AL.
vs.
WALTER MOISE. } No. 90 T.

JAMES HENNESSY ET AL.
vs.
CARRIE R. MAY ET AL. } No. 123 T.

Mr. Horton, for complainants.
Mr. Tuttle and Mr. Breen, for respondents.

Opinion.

MCPHERSON, *J.:*

I think the bills in all three cases should be dismissed at the costs of the complainants. It is due to counsel that I state my reasons. But I shall state the reasons without extended discussion.

1. Complainants do not make a case under the act of Congress of March 3, 1881. There is neither allegation nor proof that any one of respondents has been doing business, or is likely to engage in business in any grade or brand or manufacture of brandies, with any Indian tribe or with any people of a foreign country.

34 It is very doubtful if they or any of them with such liquor has done an interstate business. It is clear to me that Congress by the act did not mean to cover an interstate business because of the doubtful constitutional validity. Aside from the commerce clause, the Constitution gives Congress the power to legislate with reference to business with the Indians and foreign countries.

2. The several bills do not plead jurisdictional facts to give complainants a standing in court. Their cause of action, if they have any, is because of the amount in controversy, and diverse citizenship, and not under the act of Congress of March 3, 1881.

The amount in controversy is said to be over two thousand dollars, because of plaintiffs' right of property in their common-law trade-mark. Respondents' citizenship in each case is alleged to be

that of the State of Nebraska. But complainants' citizenship or alienage is not alleged, as required.

Stuart *vs.* Easton, 156 U. S. 46.

Randot *vs.* Township of Rogers, 79 F. R. 676.

Of course this is technical, but it always is and must be so.

Leave to amend is asked so that the proper allegations can be made. This will be denied. While this is discretionary, and generally leave to amend is granted, yet in these cases every claim asserted by complainants is so technical as to be almost without merit. By this is not meant that there is doubt of the value of complainants' trade-mark. I have no doubt of that. Neither have I doubt of its great value to complainants. But the alleged grievances in these cases are that a few bottles of brandy were sold, and that the bottles and labels were in imitation of complainants'. But there is not the slightest pretense that any of the respondents is a pirate in the business. On the contrary the proofs are that the imitations would deceive any one but the complainants themselves, and
35 that the respon-ents supposed they were getting complainants' brandies. But a very few bottles were sold, and those with the utmost good faith. And even then there is no word of proof that these bottles did not contain complainants' brandies.

Complainants' trade-mark and their property right is now, and for years has been fully established. It is denied by no one.

Decrees of this court in these cases in favor of complainants could not give them a stronger title or a more substantial showing than they now have. And I do not believe that the powers of this court should be exercised to grant an injunction because of the innocent or mistaken sale of one or two bottles of brandy, and then a reference to a master to ascertain damages of one or two dollars, all entailing much costs for some of the parties to pay. If any of respondents were likely to annoy or injure complainants in the future, the case would be quite different.

As it is I believe that it is much the more nearly justice by ending the cases where they now are.

And it is ordered that the several bills as amended be dismissed at complainants' costs.

June 28, 1901.

36 Thereupon afterward, to wit: on the 3rd day of August, 1901 an order and decree was entered and filed in said case, and entered of record on the journal of proceedings in said court had on said day, which said order and decree is as follows, to wit:

37 JAS. JENNESSY ET AL.
vs.
RICHARDSON DRUG COMPANY. } 77 T.

The parties by their attorneys come and submit this cause to the court on the pleadings and evidence; and upon due consideration thereof, the court finds that complainants' bill as amended should be dismissed at complainants' costs.

It is therefore ordered and adjudged that complainants' bill be and the same hereby is dismissed, and that defendant go hence without day and recover of the complainants its costs herein. To which finding and judgment the complainants then and there duly except.

38 Thereupon afterward, to wit: on the 5th day of October, 1901 "assignment of error" was filed in said case, which said assignment is in words and figures following, to wit:

39 In the Circuit Court of the United States for the District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, Armand Castillon, Emmanuel Castaigne, Copartners as James Hennessy & Co., Complainants, *against* RICHARDSON DRUG COMPANY, Respondent.	77 T. Assignment of Errors.

The United States circuit court for the district of Nebraska which entered a decree of dismissal of complainants' bill in said cause erred as follows:

In dismissing complainants' bill for want of jurisdiction.

In order that the foregoing assignment of errors may be and appear of record, the complainants present the same to the court, and pray that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and complainants pray a reversal of the decretal order and decree of dismissal made and entered by said court.

ADOLPH L. PINCOFFS,
RICHARD S. HORTON,
Solicitors for Complainants.

40 Thereupon afterward, to wit: on said 5th day of October, 1901 "petition of allowance of appeal" was filed in said case, which said petition is in words and figures following, to wit:

41 In the Circuit Court of the United States for the District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, Armand Castillon, Emmanuel Castaigne, Copartners as James Hennessy & Co., Complainants, *against* RICHARDSON DRUG COMPANY, Respondent.	77 T. Petition of Allowance of Appeal.

The above-entitled complainants conceiving themselves aggrieved by a decree of dismissal made and entered on the 3rd day of August, 1901 whereby it adjudged and decreed that complainants' bill filed in said cause be dismissed for want of jurisdiction with costs to the respondent, now come by their solicitor and counsel, Richard

S. Horton, Esq., and petition the said court for an order allowing said complainants to prosecute an appeal from said decree to the United States Supreme Court upon the sole question of jurisdiction, under and according to the laws of Congress and the statutes of the United States in such cases made and provided, and also that an order be made fixing the amount of security which complainants shall give and furnish upon said appeal, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Supreme Court. And your petitioners will ever pray.

ADOLPH L. PINCOFFS,
RICHARD S. HORTON,
Solicitors for Complainants.

42 Thereupon afterward, to wit: on said 5th day of October, 1901 "decree" was filed in said case, which said decree is in words and figures following, to wit:

43 In the Circuit Court of the United States, District of Nebraska.

JAMES HENNESSY
vs.
RICHARDSON DRUG COMPANY; Also vs. WALTER Moise *et al.*; Also vs. Carrie May *et al.* } 77 T, 90 T, 123 T.

Decree.

The decree heretofore entered August 3, 1901 is expunged and the following decree is entered.

The parties by their attorneys submit this cause to the court on the pleadings and evidence. And the court files a written opinion herein, which opinion is here and now referred to, and made of record in this case, as the views of the court.

And the court finds that neither the bill, nor the bill as amended nor the evidence shows the citizenship of complainants, or any of them so as to confer jurisdiction upon this court.

And the court further finds with and for the defendants and against the complainants on the evidence, and that the bill as amended is without equity.

And for both and all the reasons hereinbefore recited, it is ordered and adjudged that complainants' bill, and the bill as amended be and the same are hereby dismissed, and that defendants go hence without day, and recover of the complainants all costs herein. To which findings, judgment and decree the complainants at the time except.

And this decree is signed and entered as of the date of Aug. 3, 1901.

SMITH McPHERSON, *Judge.*

44 Thereupon afterward, to wit: on said 5th day of October, 1901 "order allowing appeal" was filed in said case, which said order is in words and figures following, to wit:

45 In the Circuit Court of the United States, District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, ARMAND Hennessy, Emmanuel Hennessy, Copartners as James Hennessy, Complainants,
vs.
RICHARDSON DRUG COMPANY; Also *vs.* CARRIE May *et al.*; Also *vs.* Walter Moise *et al.*
} 77 T, 123 T, 90 T.

On motion by Richard S. Horton, solicitor and of counsel for complainants, it is ordered that the appeal to the United States Supreme Court from the final decree herein dismissing said action for want of jurisdiction, and because of a want of equity in the bill as amended and the evidence, as shown by the said decree, be and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and opinion filed and all proceedings herein be forthwith transmitted to said United States Supreme Court.

It is further ordered that the bond of appeal be fixed at the sum of $50.00, the same to act as a supersedeas bond for costs and damages on appeal.

Dated Oct. 1, 1901.

SMITH McPHERSON,
Circuit Judge.

46 Thereupon afterward, to wit, on said 5th day of October, 1901 "certificate for appeal" was filed in said case, which said certificate is in words and figures following, to wit:

47 Circuit Court of United States, District of Nebraska.

JAMES HENNESSY ET AL.
vs.
RICHARDSON DRUG COMPANY.
} 77 T.

HENNESSY
vs.
WALTER MOISE ET AL.
} 90 T.

HENNESSY
vs.
CARRIE R. MAY ET AL.
} 123 T.

It is certified that the question of jurisdiction referred to in the opinion was passed upon—but that the case was also determined upon its merits.

The question of jurisdiction set forth in the opinion filed herein together with the question of the merits of the case is hereby certi-

fied to the Supreme Court, all of which are shown by the decree and the opinion.

Oct. 1, 1901.

SMITH McPHERSON, *Judge.*

48 [Endorsed:] File No. 18,341. Supreme Court U. S. October term, 1901 Term No. 203 James Richard Maurice Hennessy *et al.* app'ts *vs.* Richardson Drug Company. Statement of errors and designation by appellants of parts of record to be printed & proof of service of same. Filed March 6", 1902.

LE COPY.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 203.

JACQUES RICHARD MAURICE HENNESSY [illegible],
APPELLANT,

vs.

RICHARDSON DRUG COMPANY,
APPELLEE.

BRIEF FOR APPELLANT.

ADOLPH L. FISCHER,
JAMES L. HOPKINS,
RICHARD S. HOSMER,
Of Counsel for Appellant.

[illegible] Printing Co., 49-51 Park Place, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1902, No. 203.

JACQUES RICHARD MAURICE HENNESSY and others,
Appellants.

vs.

RICHARDSON DRUG COMPANY,
Appellee.

Brief for Appellants.

This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska, dismissing the bill of the appellants. Decrees dismissing the bills brought against Walter Moise and against Carrie R. May and others were entered at the same time. Appeals were taken from the decrees in the three cases. By a stipulation of the parties properly filed it was agreed that only the record in the Richardson case should be printed, as the same questions are involved in all, and that the appeal in the other cases should be heard on the record in this case.

The bills were brought by the complainants, who are engaged in producing, bottling and ex-

porting a liquor known as Hennessy Brandy, against the defendant, who is charged with selling brandy under the name of Hennessy Brandy, using fac similes of complainants' trade-name, devices and labels, all of which are fully set out in the complaint. The complaint alleges that the complainants are "all of Cognac in France" and "citizens of the Republic of France" (see fol. 6 of the Record), and that the defendant is a citizen of the State of Nebraska. It is alleged that the value of the trade-mark exceeds the sum of $2,000 (fol. 7 of Record).

The defendant answered the complaint and did not specifically deny that the complainants were citizens of the Republic of France nor did he raise any objection to the jurisdiction of the Court. He denies that the brandy sold by the complainants under their label and trade-mark is imported brandy at all and alleges that it is produced and bottled in the United States, and he claims that the alleged trade-mark is a fraud used to deceive the public (see fol. 14 of Record), and charges various other fraudulent acts on the part of the complainants (fol. 15). The answer admits that defendant is a citizen of the State of Nebraska, but denies, amongst other things, that the defendant has sold brandy with labels counterfeiting the labels used by the complainants.

After the case was submitted on the pleadings and proofs, the Court dismissed the bill, delivering an opinion, which is made part of the record (fols. 33-36).

After stating that no case is made out under the Act of 1881, the Court decides that the several bills do not plead jurisdictional facts to give complainants a standing, because complainants' citizenship or alienage is not alleged, as required (fol. 34).

The Court finds that there is no doubt of the

value of complainants' trade-mark and that it is now and for years has been fully established, that it is denied by none and that decrees of the Court in these cases in favor of complainants could not give them a stronger title or more substantial showing than they now have. Leave to amend so that what the Court considered proper allegations about citizenship could be made was denied because the claim asserted by complainants was considered by the Court to be technical, and it was therefore the opinion of the Court that "more nearly justice would be done by ending the cases where they now are" instead of exercising the powers of the Court to grant an injunction and ordering a reference to ascertain a small amount of damages, all entailing much costs.

On the 3rd day of August a decree was entered dismissing the bills. The assignment of errors was that the Court erred in dismissing complainants' bill for want of jurisdiction (fol. 39), and the petition of appeal was for an order allowing said complainants to prosecute the appeal from said decree on the sole question of jurisdiction (fol. 4).

The decree originally entered dismissed the bill without stating expressly that the dismissal was on the ground of want of jurisdiction and the complainants asked to have the decree amended so as to show this fact. The Court, however, entered another decree *nunc pro tunc*, which is found in fol. 43 of the record, expunging the original decree, making the written opinion "part of the record of the case as expressing the views of the Court," finding that "neither the bill nor the bill as amended nor the evidence shows the citizenship of the complainants or any of them so as to confer jurisdiction upon this Court" and "further" finding that the bill as amended is without equity, and for both and all these reasons dismissing the

bill. The order allowing the appeal is found in fol. 45 and the certificate of appeal is found in fol. 47. In it the Court certifies "that the question of jurisdiction referred to in the opinion was passed upon, but that the case was also determined on the merits."

The errors relied upon are in substance: first, that the Court erred in holding that the allegations as to citizenship of the complainants were not sufficient; second, that it was incumbent on the complainants to prove such allegations and, third, that it attempted to pass on the merits after deciding that it had no jurisdiction.

POINTS.

I.

The Circuit Court erred in holding that the jurisdictional facts as to the complainants' citizenship were not properly alleged.

The Constitution and the Judiciary Act provide that the Federal Courts shall have jurisdiction as to controversies where the necessary jurisdictional amount is involved "between citizens of a State and foreign States, citizens, or subjects thereof." The complaint alleges that complainants are all citizens of the Republic of France. We claim that this clearly and indubitably complies with the statutory provision. It would not have been sufficient to allege that the complainants are aliens but the allegations must be to the effect, as was done here, that they are either citizens or subjects of a foreign State (Wilson v. City Bank, 3 Sumner, 422). The cases cited by the learned Judge below

in no way indicate that this allegation is insufficient.

The case of Stuart v. Easton, 156 U. S., 46, holds that the fact of alienage must affirmatively appear and it holds that the allegation that a party is a citizen of the City of London is not sufficient. The decision is based on the fact, as was suggested by Judge Lacombe in the case of Betancourt v. M.R. F. Life Ass'n, 101 Fed. Rep., 305, that London is not a free and independent country,—not a State within the meaning of that word as used in the Constitution and Judiciary Act. That case, therefore, is in no way an authority in support of the proposition that the allegation that the party is a citizen of the Republic of France, which is a free and sovereign State, is insufficient to show jurisdiction where the defendant, as in this case, is a citizen of a State of the Union.

The case of Rondot v. Township of Rogers, 79 Fed. Rep., 676, held that an allegation that the complainant was a resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain was insufficient.

It is unnecessary to discuss whether that case was properly decided and did not extend the doctrine laid down by this Court beyond its original limits. It might be said in support of it that it is improper to allege that a person who resides in a monarchical government is a citizen but that the proper allegation would be that he is a subject of the monarch to whom he owns allegiance. In our case, as France has a republican form of government, the allegation that he is a citizen of such government, is sufficient.

The distinction here insisted upon between the words "citizen" and "subject" is recognized by this Court in the case of United States v. Wong Kim Ark, 169 U. S., 649, 662, 664. It cites with

approval the case of United States v. Rhodes, 1 Abb. U. S., 28, in which it is said "all persons born in the allegiance of the King are natural born subjects and all persons born in the allegiance of the United States are natural born citizens." Again it cites the words used in State v. Manuel, 4 Dev. & Bat., 20, 24, 26: "The term *citizen* in our law is precisely analagous to the term *subject* in the common law and the change of phraseology has entirely resulted from the change of government. The sovereignty has been transposed from one man to the collective body of the people and a subject of the King is now a citizen of the State."

Judge McPherson interprets the words "citizens or subjects" as if they read "citizens and subjects." While it is true that sometimes the word "or" may be changed to "and" in interpreting a statute, this is only so where the word "and" as used would lead to absurd results and would be clearly contrary to the intention of the Legislature.

Endlich on Statutes, Sec., 305.

In this case no such necessity exists, as the meaning of the statute is perfectly clear and we venture to say has never before, as to this point, been doubted.

II.

The Court erred in holding that it was incumbent on the complainants to prove the allegation of citizenship.

If it is held by this Court that the allegation of the citizenship of complainants was sufficient, it is clear that the burden of proving such allegation to be untrue is on the defendant. This is so even if the objection to the jurisdiction has been properly

taken by the defendant. The doctrine on this point is well stated in the recent case of Adams v. Shirk, 117 Fed. Rep., 801:

"The question is not, as plaintiff in error contends, whether defendants in error have discharged the burden of proving that Elbert W. Shirk was a citizen of Indiana. The proper allegation of jurisdictional facts, *prima facie*, was true. Simply to deny that Elbert W. Shirk was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other state than Illinois, of which plaintiff in error was a citizen. That Elbert W. Shirk was a citizen of Illinois was a material and necessary allegation. It was an affirmative averment, the burden of proving which even under a proper plea in abatement would have fallen on plaintiff in error (Sheppard v. Graves, 14 How., 505, 512; De Sobry v. Nicholson, 3 Wall., 420). Under the plea in the present case, the office of which was no broader than a motion or a suggestion to the Court to protect itself from imposition, the burden most assuredly was upon the moving party. Plaintiff in error introduced no evidence on the subject. The evidence of defendants in error does not establish that Elbert W. Shirk was a citizen of Illinois and that the Circuit Court was imposed upon."

In the case at bar there was no plea to the jurisdiction or plea in abatement, nor was the objection to the jurisdiction raised in the answer. No evidence contradicting the allegation as to the citizenship of Appellants was introduced by defendants. The Court acted on its own motion. In order to justify this action it must appear from the record that the suit did not involve a controversy of which the Court could properly take cognizance.

Act of March 3, 1875 (18 Stat., 472).
Morris v. Gilmer, 129 U. S., 315, 326.
Anderson v. Watt, 138 U. S., 694, 701.

The only evidence in this record bearing on the

subject is the statement by the Appellants (page 11) that they reside in Cognac, France.

Even if the burden were on the complainants to prove the correctness of that allegation as to their citizenship, proof of their residence in France would be *prima facie* sufficient.

Shelton v. Tiffin, 6 How., 163.
Express Company v. Kountze Bros., 8 Wall., 342.
Collins v. City of Ashland, 112 Fed. Rep., 175.

But, as already stated, the burden to prove lack of the necessary diversity of citizenship is on the defendant and there certainly is nothing in the statement that the complainants are residents of Cognac to prove that they are citizens of Nebraska.

III.

The Court erred in assuming to pass on the merits after it had determined the question that it had no jurisdiction and its attempt to do so must be treated as a mere nullity.

On reading the opinion of the Court below, which is made part of the record, it is impossible to come to a different conclusion, but that the Court at that time was of the opinion that the complainants had made out their case but that their claim was so technical that it seized the opportunity afforded by what it considered a lack of jurisdictional allegations to dismiss the bill, in order not to have to do what otherwise would have been its duty, namely, to grant an injunction. If this were not so, why was leave to amend refused? If the Court had intended to decide the matter on the

merits there was no reason whatever why the jurisdictional defect should not have been remedied. While we disclaim any intention to argue the merits of this case before this Court, we simply wish to say that it is difficult to see how the Court below could have come to any other conclusion but that complainants were entitled to at least an injunction where it finds that the complainants have proved their trade-mark beyond question; and that the defendants have sold goods bearing counterfeit labels, even if such sales were made in good faith (Saxlehner v. Siegel Cooper Co., 179 U. S., 42).

Nor do we wish to comment on the strange reluctance of the Court to grant an injunction against parties who try to defeat complainants by charging them with the most atrocious frauds, although on the evidence the Court finds that the trade-mark of complainants is so firmly established that no decree of the Court can give them a better assurance.

In the amended decree the Court, while dismissing the bill for lack of the necessary jurisdictional allegations, "further" dismisses it on the merits. And in the certificate, while certifying that it has passed on the question of jurisdiction, it states that the merits have also been passed upon.

We claim that the Court had no power both on general principles and in virtue of the express provisions of the statute from which it derives its jurisdiction, to pass on the merits after it had decided that it had no jurisdiction. Its attempt to do so must be treated as an absolute nullity.

It is a well settled principle that a Court, even of general jurisdiction, should not pass on the merits after it has denied its own jurisdiction in the premises. This principle is well expressed by the Supreme Court of Virginia in the case of Tay-

lor v. Mutual Reserve Fund Life Association, 97 Va. 60.

> "Whenever a Court determines that it has no jurisdiction of a case it should express no opinion upon the merits of the controversy. The only course which a Court can rightfully pursue in such a case is to decline to speak at all where it cannot speak by the law."

In Howard v. Kentucky & Louisville Mutual Ins. Co., 52 Ky., 282, the defendant interposed two pleas, the first denying the jurisdiction and the second one being a defense on the merits. The plaintiff demurred to both pleas and both demurrers were overruled by the Trial Court. On appeal the Court held that the demurrer to the first plea was improperly overruled, but although it found that the Court below had jurisdiction it held that it was error for the Court below to pass upon the second demurrer, which involved the merits, saying:

> "Nor should the second demurrer have been acted upon by the Court, as the effect of its decision upon the first demurrer was to put the plaintiff out of Court. We shall therefore regard the judgment as having been pronounced upon the question of jurisdiction made under the first demurrer and the parties as occupying the same attitude they would have done if the Court had not acted at all upon the second demurrer."

See also to the same effect:

Stough v. C. & N. W. R. R. Co., 71 Ia., 641.

Gray v. Dean, 136 Mass., 128.

Wheeler & Wilson Mfg. Co., v. Whitcomb, 62 N. H., 411.

This Court has consistently followed the principle here contended for. In the exercise of its

original jurisdiction it has always declined to express an opinion on the merits in cases where it came to the conclusion that it had no jurisdiction. (See Minnesota v. Hitchcock, 185 U. S., 373). And it has adopted the same rule in the exercise of its appellate jurisdiction even where the merits had been fully discussed before it.

In the case of Metcalf v. City of Watertown, 128 U. S., 586, Mr. Justice Harlan has used the following language:

> "Although the question of the jurisdiction of the Circuit Court over the present suit was suggested at the bar, the case was argued entirely with reference to the construction and effect of the Statute of Wisconsin, prescribing, in respect to causes of action accruing before November 1, 1878, ten years as the period within must be commenced, "an action upon a judgment or decree of any Court of Record of any state or territory within the United States, or of any Court of the United States," while twenty years was fixed, by the same statute, for the commencement of "an action upon a judgment or decree of any Court of Record of this (that) State." The Court below held the suit to be barred by the limitation of ten years. Rev. Stat. Wis., 1858, Chap. 138, Secs. 1, 14, 15, 16; *Id.*, 1878. *We are not, however, at liberty to express any opinion upon the question of limitation*, if the Court, whose judgment has been brought here for review, does not appear from the record, to have had jurisdiction of the case. And whether that Court had or had not jurisdiction is a question which we must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits."

Following the same pinciple it has repeatedly reversed the decrees of the lower Court dismissing bills upon the merits in cases where such Court had

no jurisdiction and has directed that the bill should be dismissed without prejudice.

Barney v. Baltimore City, 6 Wall., 280.
Kendig v. Dean, 97 U. S., 423.
Parker v. Ormsby, 141 U. S., 81, 83.
Lake County Commissioners v. Dudley, 173 U. S., 243, 253.

The provision of the statute in virtue of which the Court below acted fully recognizes this principle. The question of the jurisdiction was not raised by the defendants and the sufficiency of the jurisdictional allegations was not challenged by them. The Court acted of its own motion. The statute giving it such power expressly says that "if any suit commenced in the Circuit Court * * * it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve the dispute or controversy properly within the jurisdiction of said Circuit Court * * * the said Circuit Court *shall proceed no further but shall dismiss the suit.*" (Act of March 3, 1875, Chap. 137, Sec. 5).

This provision has been the subject of numerous adjudications by this Court. It has been held that this proviso of the Act of 1875 is a salutary one and that it is the duty of the Circuit Court to exercise their power under it in proper cases.

Williams v. Nottawa, 104 U. S., 209.
Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S., 282.

It has further been held that the action of the Circuit Court is reviewable by this Court under the Act of March 3, 1891, Chapter 517, Sec. 5.

Wetmore v. Rymer, 169 U. S., 115, 118.
Huntington v. Laidley, 176 U. S., 668.

In the case of United States v. Jahn, 155 U. S., 109, this Court, in considering the course to be pursued in the various cases where the question of jurisdiction of the Court has been passed upon, says:

"Where the jurisdiction of the Circuit Court is in issue and decided in favor of the defendants, *as that disposes of the case*, the plaintiff should have the question certified and take his appeal or writ of error directly to this Court."

The express words of the statute and the cases interpreting it all tend to show that before the question of merits can be considered, where the Court decides that it has no jurisdiction, an opportunity must be given to the complainant to have the jurisdictional question reviewed by the Supreme Court. If that Court agrees with the Court below the case is at an end. If it holds that the Court had jurisdiction it will send the case back for further proceedings. Then for the first time a decision on the merits will be made and from that decision, if adverse to the complainant, an appeal can be taken to the Circuit Court of Appeals.

The appellants in this case have done exactly what the law requires them to do. Their assignments of error and the petition for appeal, show that the only question they asked this Court to review is the question of jurisdiction.

This is not a case where there can be any doubt from the record whether the question of jurisdiction has been passed upon. The opinion which this Court will consult for the purpose of ascertaining on what ground the decision was based (Loeb v. Columbia Township Trustees, 179 U. S., 472) not only shows that the question was passed upon, but taken by itself would indicate that the Court

did its duty and after deciding the jurisdictional question adversely to the complainants "proceeded no further in the case." From the decree it appears that the jurisdictional question was decided first and that after deciding it the Court "further" finds as to the merits. These facts alone would be sufficient to show that the jurisdiction of this Court was properly invoked even without a certificate (*In re* Lehigh Min. & Mfg. Co., 156 U. S., 322). But in this case the judge has certified that the jurisdictional question was determined and expressly refers to the *opinion* as embodying his views. Can, under these circumstances, the complainant's right to a review of the jurisdictional question by this Court, a right which, as is said in Wetmore v. Rymer, 169 U. S., 115, 120, was expressly reserved to them in the statutes, be affected by an absolutely illegal act of the Court, in contravention of the statute from which it derives its powers and existence? We claim that it cannot, and that the most charitable course this Court can take is to treat the statements of the Court below, in which it certifies as to its own illegal acts, as surplusage.

Nor can any life be injected into such attempted finding on the merits by the decision of this Court that the Court below had jurisdiction. The purpose of the statute, as we argued, is that the question of jurisdiction, if its existence is denied by the Court below, should be settled before the merits are touched. The complainants, when they appealed on the jurisdiction question to this Court, as was their duty and right, could not, even if they had wished to, have appealed to the Circuit Court of Appeals on the merits, because the statute does not permit of two appeals in the same case. (McLish v. Roff, 141 U. S., 661). They had a right to treat such decision as a nullity. If any

effect were given to it because the Court below improperly denied its own jurisdiction, it would follow that although they followed the only course open to them, they might be deprived by the lapse of time of the right given to them by statute to have the decision on the merits reviewed by the Circuit Court of Appeals.

IV.

The decree should be reversed and the cases remanded to the Court below for further proceedings.

Respectfully submitted,
ADOLPH L. PINCOFFS,
JAMES L. HOPKINS,
RICHARD S. HORTON,
Of Counsel for Appellant.

[1541]

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Supreme Court U. S.
FILED
MAR 13 1903
JAMES H. McKENNEY,
Clerk.

No. 203.

JAMES HENNESSY ET AL., APPELLANTS,

vs.

RICHARDSON DRUG COMPANY.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

ADOLPH L. PISCOTTY,
Counsel for Appellants.

(18,341.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 6306

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 203.

JACQUES RICHARD MAURICE HENNESSY AND OTHERS, APPELLANTS,

vs.

RICHARDSON DRUG COMPANY, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Counsel for appellants submits the following memorandum on the point suggested by Mr. Justice Brown on the argument, viz., whether it was sufficient to allege, as was done in this bill, that the value of the trade-mark sought to be protected exceeded $2,000, or whether there should have been an allegation that the amount of the damage done by the acts of the defendants exceeded that sum.

On the argument reference was made to the following cases and text writers as sustaining the contention of the appellants and passing upon this exact point:

Symonds *vs.* Greene, 28 Fed. Rep., 834.

Hennessy *vs.* Herrman, 89 Fed. Rep., 669.

Foster on Federal Practice, § 16, p. 51.

See also Hopkins on Unfair Trade, p. 216.

This court is, of course, not bound by any of these decisions, but it is submitted that they are based on correct principles and are supported by the decisions of this court.

They are merely an application of the general rule, approved by this court, that in an action for an injunction jurisdiction is determined by the value of the right to be protected and by the values of the object to be gained.

Mississippi & Missouri R. R. Co. *vs.* Ward, 2 Black, 485.

Market Co. *vs.* Hoffmann, 101 U. S., 112.

See also Humes *vs.* City of Ft. Smith, 93 Fed. Rep., 862.

Delaware & Lackawanna R. R. Co. *vs.* Frank, 110 Fed. Rep., 689.

This court has laid down the principle that an injunction should be allowed against parties who infringed a trade-mark in good faith and against whom, therefore, no damages could be recovered, and against others whose sales, as this court finds, were so small that "they should not be required to account for gains and profits" (Saxlehner *vs.* Siegel-Cooper Company, 179 U. S., 42, 43). This, it may well be said, is an implied recognition of the principle here contended for, viz.: That the value of the trade-mark determines the amount in controversy, as otherwise it is difficult to see why this court, instead of directing the court below to enter a decree for complainants, did not direct the dismissal of the bill for want of jurisdiction.

In considering this question the court will remember that it appears from the pleadings in this case that *the right to the trade-mark itself was put in issue by the defendants*, and that

the right of the complainants to enjoy and protect their trade-mark, if they have any—without which it would be valueless—is challenged by charging them with the most atrocious frauds. (See answer, folios 12 to 14 of record.)

It is clear, therefore, that in this case the matter in dispute, the value of which determines the jurisdiction of the court, is the trade-mark itself and the right to its enjoyment. Even, therefore, if, in a case such as was suggested by Mr. Justice Brown on the argument, where only one bottle was sold, there might be some doubt whether an allegation that the trade-mark was worth more than $2,000 would be sufficient, if, on the coming in of the answer, it appeared that there was no denial of the right of complainants to their trade-mark, but that the only question to be litigated was whether or not defendant had made such sale, such doubt cannot exist in this case, where the defendant challenges the right of complainants to their trade-mark and their right to enjoy and protect it, without which it would be valueless, where the protection of such right is the object of the suit and where the injury and damage to complainants, were the contention of defendants to prevail, would be the loss of such trade-mark, the value of which is alleged to exceed $2,000.

Respectfully submitted.

ADOLPH L. PINCOFFS,
Counsel for Appellants.

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Supreme Court of the United States.

October Term, 1902.

No. 203.

R. M. HENNESSY AND OTHERS,
Appellants,
vs.
RICHARDSON DRUG COMPANY,
Appellee.

BRIEF FOR APPELLEE.

CHARLES F. TUTTLE,
Solicitor for Appellee.

This proceeding is an appeal from a Circuit Court of the United States to this court.

A preliminary question is, whether this court will entertain the invitation of appellants to decide the questions presented in their statement of errors and brief, because of their failure to properly present, for consideration here, any SINGLE, PRECISE, CONTROLLING question of jurisdiction. No SPECIFIC question of jurisdiction is DEFINED or INDICATED in the record. To specify, to define, to indicate such questions *in the briefs* of the complaining parties does not supply the silence of the record in that jurisdictional particular.

It will be observed that appellants' assignment of

errors filed in the trial court is in these words: "In dismissing complainants' bill for want of jurisdiction." (P. 19).

This assignment does not present any definite specific question of jurisdiction. In passing, it may be remarked, that the decree did not dismiss complainants' bill "for want of jurisdiction." The original decree entered in the Circuit Court was dated August 3rd, 1901, and contains no reference to any jurisdictional question; the decree is in these words: "The parties by their attorneys come and submit this cause to the court on the pleadings and EVIDENCE; and upon due consideration thereof the court finds that complainants' bill as amended should be dismissed at complainants' costs."

It is clear that the assignment of errors aided by the original decree does not present ANY question of jurisdiction.

Appellants then filed in the Circuit Court their petition of allowance of appeal in which is stated: "The above entitled complainants conceiving themselves aggrieved by a decree of dismissal made and entered on the 3rd day of August, 1901, whereby it was adjudged and decreed that complainants' bill filed in said cause be dismissed for want of jurisdiction."

It will be noticed that the decree contains no reference to a dismissal "for want of jurisdiction." The only reference to jurisdiction is injected into the record by appellants' petition of allowance of appeal, and even in that paper appellants do not set forth ANY SPECIFIC QUESTION OF JURISDICTION;—only the embracive phrase "FOR WANT OF JURISDICTION";—as broad as the laws defining the jurisdiction of the Circuit Courts of the

United States and the many decisions of this court relating thereto.

Though the evidence and the merits of the cause had been fully heard and determined in the court *a quo* and the bill dismissed GENERALLY, appellants still insisted that the Circuit Court GROUND its decree upon want of jurisdiction, and so on October 5, 1901, they procured a second decree. (P. 20). That decree shows that the Circuit Court was still unwilling to accede to complainants' wishes and base the dismissal of the bill on the SOLE GROUND of WANT OF JURISDICTION.

Still insisting against the record that their bill had been dismissed for WANT OF JURISDICTION and, without stating in what particular the want of jurisdiction appeared, an order was entered, on the motion of complainants, allowing an appeal to this court. It will be observed that the Circuit Court in making the order was careful to insert therein the statement that the order was entered on the MOTION OF COMPLAINANTS' SOLICITOR and to also insert a direction that the TESTIMONY and ALL PROCEEDINGS HEREIN be transmitted to this court. (P. 21).

The same unwillingness on the part of the Circuit Court to base its decree upon any SINGLE principle of law or question of fact is apparent in what appellants term "the certificate." That paper on its face shows that jurisdictional questions were not of CONTROLLING FORCE in the dismissal of the bill and that the trial court did not desire to and WOULD NOT certify to this court the many questions of jurisdiction arising and incidentally PASSED UPON by that court on a full and complete hearing and submission of the cause on the evidence and merits. The language of the order is

as follows: "It is certified that the question of jurisdiction referred to in the opinion was PASSED UPON—but that the case was also DETERMINED UPON ITS MERITS. The question of jurisdiction set forth in the opinion filed herein TOGETHER WITH THE QUESTION OF THE MERITS OF THE CASE is hereby certified to the Supreme Court." * * * (P. 21).

Had appellants brought this appeal on the record and without a certificate no *single, precise, specific, definite, controlling* question of jurisdiction would have been presented. Had they applied here for a writ directing the trial court to grant a certificate would their application have been granted, in view of the decisions of this court hereinafter cited?

The Certificate Contains Matters Other than Questions of Jurisdiction.

The so-called certificate does not contain a single, definite, clear, specific question of jurisdiction.

It is so broad as to require a search of the record by this court to ascertain what particular question of jurisdiction was involved.

This Court will not make such a search, nor follow counsel in such a search.

If this court will make such a search no particular, specific and definite question of jurisdiction will be found.

No mere suggestion that the jurisdiction of the court was in issue will answer.

Proceedings to this court were here dismissed for lack of a proper presentation of a single, precise, specific question of jurisdiction in the following cases and

they are favorably decisive of all the above contentions.

Maynard v. Hecht, 151 U. S. 324.

Moran v. Hagerman, 151 U. S. 329.

In re Lehigh Co., 156 U. S. 322.

Sheilds v. Colman, 157 U. S. 168.

Interior Construction Co. v. Gibney, 160 U. S. 217.

Van Wagenen v. Sewall, 160 U. S. 369.

Chappell v. U. S. 160 U. S. 499.

Davis v. Geissler, 162 U. S. 290.

Huntington v. Laidly, 176 U. S. 668-676.

The first point made in the brief of appellants is that "the Circuit Court erred in holding that the jurisdictional facts as to the complainants' citizenship were not properly alleged."

If such a question arose on the trial it is not properly presented in this court.

However, if a search of the record be made, it will be found that no such question was the REAL and SUBSTANTIAL GROUND of the decree and the assignment for that reason should not be considered.

If, however, the assignment be considered it may be observed that the jurisdictional facts as to the ALIENAGE of complainants and their alleged partnership are not properly pleaded.

Stuart v. Easton, 156 U. S. 46.

The second point made in the brief of appellants that "The court erred in holding that it was incumbent upon the complainants to prove the allega-

tion of citizenship," like the first point, is not properly presented for determination by this court. It does not appear that the point was of *controlling* force in the trial court and should not be considered. But if considered it will be found untenable, for the reason that, under the Code of Nebraska, the answer takes the place of all pleas, whether general or special, in abatement or to the merits and the general denial of appellee's answer put in issue appellants' jurisdictional averments. *Roberts v. Lewis*, 144 U. S. 653, arose in the Circuit Court of the United States for Nebraska and is directly in point. In that case the point was not argued by counsel in this court but Mr. Justice Gray speaking for the court said: "But a preliminary question to be decided is whether the Circuit Court of the United States appears upon this record to have had any juris diction of the case." Proceeding to a consideration of the question the court said: "The necessary consequence is that the allegations of citizenship of the parties, being a material allegation properly made in the petition was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant must be *proved by the plaintiff*. THE RECORD SHOWING NO PROOF or finding upon this ESSENTIAL POINT on which the JURISDICTION OF THE CIRCUIT COURT DEPENDED, the judgment must be reversed, with costs, for WANT OF JURISDICTION IN THE CIRCUIT COURT."

The statement in appellants' brief that "in order to justify the action of the trial court in dismissing the bill it must appear from the record that the suit did not involve a controversy of which the court could properly take cognizance," is not an accurate statement of the law in view of the opinion in the last cited

case. More accurately stated it would seem that jurisdiction in the Circuit Court will not be presumed but must affirmatively appear.

The third assignment of error in appellants' brief that the Court erred in passing upon the merits of the case is not within the field of this appeal. It does not involve any question touching the jurisdiction of the Circuit Court. The assignment is one not contemplated by the act granting the right of appeal from Circuit Courts direct to this court.

The Evidence Before the Trial Court is not Preserved in Proper Form and is not Before This Court in any Form.

The statement in appellants' brief that no evidence was introduced by defendants on various points on the trial is not true in point of fact; but as appellants have not preserved the evidence this court is precluded from an intelligent investigation of the question. What purports to be a deposition is printed in the record but as there is nothing to show that it, or the Commission, or the Notice under which it was taken was before the court for any purpose, during the trial, no statement found therein can be made the foundation of a decision in this court either upon the merits or upon any question of jurisdiction. This court is therefore unable to review the decree complained against.

The Errors, if any, were Without Prejudice.

Not only does it not appear that the trial court refused to hear appellants or denied them any rights because of any opinion it might have entertained touch-

ing jurisdictional questions; on the contrary, it affirmatively appears that the oral testimony, documentary evidence and argument of counsel offered by the appellants were all fully received, heard and determined Appellants were seeking a decree on the merits which was accorded them. It is difficult to see how rulings on jurisdictional questions were prejudicial to their rights.

The Decree Rests Upon an Independent Ground, Broad Enough to Maintain it, in Which no Question of Jurisdiction Was Involved.

The decree is grounded upon the merits of the cause. The evidence is not before this court. The opinion not being properly authenticated is no part of the record. No complaint is made that on the evidence the bill should not have been dismissed. The merits of the controversy appearing to have been fully heard and determined against the appellants the decree therefore rests upon questions of fact and principles of law independent of and not involving a determination of jurisdictional questions.

Respectfully submitted,

CHARLES F. TUTTLE,

Counsel for Appellee.

Supreme Court of the United States.

No. 203.—October Term, 1902.

James Hennessy, Maurice Hennessy, Armand Castellon, and Emanuel Castaigne, Appellants,
vs.
Richardson Drug Company.

Appeal from the Circuit Court of the United States for the District of Nebraska.

[March 23, 1903.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a bill alleging that complainants were "all of Cognac in France, and citizens of the Republic of France," and that defendant was a citizen of Nebraska, and a resident of the judicial district thereof; that complainants owned and employed a certain trade mark for Hennessy brandy, (which they produced, bottled and sold,) of a value exceeding two thousand dollars, which trade mark had been properly registered in the Patent Office under the act of Congress of March 3, 1881; and that defendant was selling an imitation "Hennessy brandy," using facsimiles of complainants' trade name, devices and labels. Injunction, profits, and damages were prayed for.

The case was brought to issue, heard on pleadings and proofs, and dismissed, it being held that the court had no jurisdiction because "complainants' citizenship or alienage is not alleged, as required;" and also that the case was with defendant on the merits.

The decree stated among other things: "And the court finds that neither the bill, nor the bill as amended nor the evidence shows the citizenship of complainants, or any of them so as to confer jurisdiction upon this court. And the court further finds with and for the defendants and against the complainants on the evidence, and that the bill as amended is without equity. And for both and all the reasons hereinbefore recited," the bill was dismissed.

The court then granted a certificate in these words: "It is certified that the question of jurisdiction referred to in the opinion was passed upon—but that the case was also determined upon its merits. The question of jurisdiction set forth in the opinion filed herein together with the question of the merits of the case is hereby certified to the Supreme Court, all of which are shown by the decree and the opinion."

An appeal was taken directly to this court under the first of the classes of cases enumerated in section five of the judiciary act of March

3, 1891, and we are shut up to the consideration of the question of jurisdiction alone. We do not understand that the amount in controversy was treated below as having any bearing in respect of that question. The act of March 3, 1881 provides for jurisdiction "without regard to the amount in controversy," and the averment here was that the value of the trade mark exceeded two thousand dollars. The point, however, was not relied on, and we confine ourselves to the question of jurisdiction as dependent on citizenship.

By the Constitution, the judicial power of the United States extends to controversies between citizens of a State, "and foreign States, citizens or subjects." And by statute, Circuit Courts of the United States have original cognizance of all suits of a civil nature, at common law or in equity, in which there is "a controversy between citizens of a State and foreign States, citizens, or subjects." 25 Stat. 433, c. 866.

In *Stuart* v. *Easton*, 156 U. S. 46, it was held that by the description of plaintiff as "a citizen of London, England," the fact that he was a subject of the British Crown was not made affirmatively to appear as required; but, in the case at bar, complainants described themselves as "all of Cognac in France, and citizens of the Republic of France," and this was sufficient.

No averment of alienage was necessary. It is true that by section 6 of the judiciary act of March 3, 1891, the judgments and decrees of the Circuit Courts of Appeals were made final in cases, among others, in which the jurisdiction was dependent entirely on the opposite parties to the suit or controversy being citizens of different States, or "aliens and citizens of the United States." But the word "aliens" as there used embraces subjects or citizens of foreign countries, and not merely persons resident in this country, who owe allegiance to another. And the language of the Constitution and of the act determining the jurisdiction of the Circuit Courts is explicit.

In *Chisholm* v. *Georgia*, 2 Dallas, 419, 456, Mr. Justice Wilson said that under the Constitution of the United States "there are citizens, but no subjects. 'Citizen of the United States.' 'Citizens of another State.' 'Citizens of different States.' 'A State or citizen thereof.' The term, subject, occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet 'foreign' is prefixed."

The Supreme Court of North Carolina in *State* v. *Manuel*, 4 Dev. & Bat. 20, 26, (quoted in *United States* v. *Wong Kim Ark*, 169 U. S. 649,) said: "The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was a 'subject of the King' is now 'a citizen of the State.'"

In that view the people of France are properly described as citizens of that Republic.

As complainants were citizens of a foreign State and defendant was a citizen of Nebraska, as affirmatively appeared from the pleadings, no issue of fact arising in that regard, the Circuit Court had jurisdiction.

Decree reversed and cause remanded for rehearing on the merits.

James Hennessy et al., Appellants,
vs.
Walter Moise et al. } No. 204.

James Hennessy et al., Appellants,
vs.
Carrie May et al. } No. 205.

MR. CHIEF JUSTICE FULLER: These cases must take the same course as that just decided, and the same decrees will be entered.

True copy.

Test:

Clerk Supreme Court, U. S.